

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DOROTHY JACKSON,)

Plaintiff,)

vs.)

Case No.: 2:13-cv-01666-GMN-NJK

ORDER

UNIVERSAL HEALTH SERVICES, INC., as)
owner and operator of DESERT SPRINGS)
HOSPITAL MEDICAL CENTER and)
DESERT SPRINGS HOSPITAL, a member of)
THE VALLEY SYSTEMS, LLC dba)
DESERT SPRINGS HOSPITAL; DESERT)
SPRINGS HOSPITAL; DESERT SPRINGS)
HOSPITAL MEDICAL CENTER; JIM)
ZOLNOWSKI,)

Defendants.)

Pending before the Court is a civil action filed by Plaintiff Dorothy Jackson (“Plaintiff”) against Defendant Valley Health System LLC, *doing business as* Desert Springs Hospital Medical Center (“DSH”). (Complaint, ECF No. 1). DSH filed a Partial Motion to Dismiss (ECF No. 13) on February 10, 2014. Plaintiff filed her Response in Opposition (ECF No. 17) on March 7, 2014, and she also filed a Countermotion to Amend the Complaint (ECF No. 18) on March 10, 2014. On March 24, 2014, DSH filed a Reply in Support of their Motion to Dismiss (ECF No. 21) and a Response to Plaintiff’s Countermotion to Amend. (ECF No. 22).

I. BACKGROUND

According to her Complaint (ECF No. 1), Plaintiff is an African-American female who was employed by DSH from April 27, 1998 until her employment was terminated on September 12, 2011. (Complaint ¶¶ 3–4, ECF No. 1). At the time of her termination, she was

1 employed as a Monitoring Tech/Unit Coordinator earning \$20.50 an hour. (*Id.* ¶ 5). Plaintiff's
2 supervisor during her employment with DSH was Defendant Jim Zolonowski ("Defendant
3 Zolonowski"). (*Id.* ¶ 8).

4 Plaintiff alleges that during her employment, she was discriminated against based on
5 both her race and her gender. (*Id.* ¶¶ 14–39). Specifically, Plaintiff alleges that while working
6 for DSH, she was "referred to [] as 'RuPaul,' who is an African-American male cross-dresser,"
7 she was held to different work standards and protocols than her non-African-American and
8 male co-workers, and she was referred to as being part of a group of employees whom
9 Defendant Zolonowski described as "lazy pieces of crap" and another group of employees
10 whom Defendant Zolonowski described as "whiny bitches." (*Id.* ¶¶ 16, 28). Plaintiff further
11 alleges that when she complained about her treatment to the HR department, she was subjected
12 to additional discipline and harassment and ultimately terminated as a result of her complaint.
13 (*Id.* ¶¶ 40–60). Plaintiff contends that DSH's stated reason for firing her based upon her failure
14 to follow protocol in staffing the telemetry department was pre-textual and that other similarly
15 situated male and non-African-American employees were not disciplined or terminated. (*Id.* ¶¶
16 18–20, 31, 33–34).

17 After obtaining her Right to Sue Letter from the Equal Employment Opportunity
18 Commission, Plaintiff filed her Complaint (ECF No. 1) on September 12, 2013 asserting seven
19 causes of action: (1) race discrimination/disparate impact in violation of § 1981, (2) gender
20 discrimination/disparate impact in violation of § 1981, (3) harassment, (4) retaliation, (5)
21 intentional infliction of emotional distress, (6) negligent training and supervision, and (7)
22 wrongful termination. (*Id.* ¶¶ 14–81). In response to the Complaint, DSH filed the pending
23 Partial Motion to Dismiss (ECF No. 13), seeking dismissal of Plaintiff's claims for race and
24 gender discrimination in violation of § 1981, intentional infliction of emotional distress,
25 negligent training and supervision, and wrongful termination.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. *See North Star Int'l. v. Arizona Corp. Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the Court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

The Court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is *plausible*, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555) (emphasis added).

In order to survive a motion to dismiss, a complaint must allege “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

III. DISCUSSION

A. **Counts 1 & 2: Race and Gender Discrimination/Disparate Impact in Violation of § 1981**

Plaintiff’s first two alleged causes of action are for discrimination/disparate impact on

1 account of her race and gender in violation of 42 U.S.C. § 1981.

2 However, as DSH points out in its motion, an allegation of discrimination based on
3 disparate treatment or disparate impact is insufficient to bring a claim under § 1981. *See Gen.*
4 *Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982) (“§ 1981, like the
5 Equal Protection Clause, can be violated only by purposeful discrimination.”) “In *General*
6 *Building Contractors*, the Court limited § 1981 to cover only acts involving intentional
7 discrimination, excluding from the statute’s reach actions that merely have a disparate effect.”
8 *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 837 (9th Cir. 2006).
9 Therefore, to the extent Plaintiff’s Complaint alleges claims for discrimination based on the
10 disparate impact of some policy, those claims are dismissed with prejudice.

11 Likewise, regarding Count II for gender discrimination, it is well-established that 42
12 U.S.C. § 1981 does not provide a cause of action for sex discrimination. *Sagana v. Tenorio*,
13 384 F.3d 731, 738 (9th Cir. 2004) (“The guarantee that ‘all persons’ may enjoy the same rights
14 that ‘white citizens’ enjoy does not protect against discrimination on the basis of gender or
15 religion”) (citing *Runyon v. McCrary*, 427 U.S. 160, 167 (1976)); *see also Jones v. Bechtel*, 788
16 F.2d 571, 574 (9th Cir. 1986) (“It is clear that section 1981 does not provide a cause of action
17 based on sex discrimination.”). Therefore, Plaintiff cannot state a cause of action for gender
18 discrimination under § 1981, and Count II of her Complaint is dismissed with prejudice.

19 To the extent Plaintiff’s claims in Count I allege that she suffered intentional racial
20 discrimination, in order to sufficiently plead her claim, Plaintiff must allege: “(1) the plaintiff is
21 a member of a racial minority; (2) an intent to discriminate on the basis of race by the
22 defendant; and (3) the discrimination concerns one or more of the activities enumerated in the
23 statute.” *Keum v. Virgin America Inc.*, 781 F.Supp.2d 944, 954 (N.D. Cal. 2011). While
24 “claims under 42 U.S.C. § 1981 do not require allegations of conspiracy,” Plaintiff “must show
25 intentional discrimination on account of race.” *Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir.

1 1989). However, at the motion to dismiss stage, “overt acts coupled with racial remarks are
2 sufficient to state a claim.” *Id.* at 1345.

3 In her Complaint, Plaintiff alleges that she was “referred to [] as ‘RuPaul,’ who is an
4 African-American male cross-dresser,” she was held to different work standards and protocols
5 than her non-African-American co-workers regarding the performance of her duties and the
6 taking of breaks, and she was referred to as being part of a group¹ of employees whom
7 Defendant Zolonowski described as “lazy pieces of crap.” (Complaint ¶ 16, ECF No. 1).
8 Plaintiff also alleges that “the conduct of Defendant and its employees has been malicious,
9 fraudulent and oppressive and was designed to vex, annoy or harass Plaintiff.” (*Id.* ¶ 24).

10 These allegations alone, however, are insufficient to state a claim for racial
11 discrimination under § 1981. *See Middlebrooks v. Godwin Corp.*, 722 F.Supp.2d 82, 88
12 (D.D.C. 2010) (“[I]n order to pursue a cause of action under § 1981, plaintiff cannot merely
13 invoke his race in the course of a claim’s narrative and automatically be entitled to pursue
14 relief. Rather, plaintiff must allege some facts that demonstrate that his race was the reason for
15 a defendant’s actions.”). While being referred to as RuPaul could perhaps have racial
16 connotations, none of the other acts identified by Plaintiff as giving rise to her claim appear to
17 have any relation to Plaintiff’s race. Plaintiff’s conclusory statement that she “has been
18 discriminated against in the workplace because of [her] race” notwithstanding, all her specific
19 allegations show is that she was not treated as well as some other employees who were not
20 African-American, not that she was intentionally discriminated against because of her race.
21 Because her Complaint falls short of the pleading standard established in *Iqbal* and *Twombly*,
22 Plaintiff’s claim for intentional racial discrimination under § 1981 must be dismissed.
23 However, because amendment does not appear to be futile at this time, this claim is dismissed
24 without prejudice.

25 ¹ Notably, Plaintiff does not allege the ethnicity of any other member of this group. (Complaint, ECF No. 1).

**B. Counts 5 & 6: Intentional Infliction of Emotional Distress and
Negligent Training and Supervision**

Plaintiff's fifth and sixth causes of action are for the common law torts of intentional infliction of emotional distress and negligent training and supervision. However, this Court and the Supreme Court of Nevada have held that Nevada Revised Statutes § 613.330 et seq. "provides the exclusive remedy for tort claims premised on illegal employment practices." *Brinkman v. Harrah's Operating Co., Inc.*, 2008 U.S. Dist. LEXIS 123992, at *5 (D. Nev. Oct. 16, 2008); *see Sands Regent v. Valgardson*, 777 P.2d 898, 900 (Nev. 1989) ("the Legislature has addressed the gravity of violating Nevada's public policy against age discrimination by defining the extent of the remedy available to parties injured by such discrimination."); *D'Angelo v. Gardner*, 819 P.2d 206, 217 n.10 (1991) ("no *additional* court-created remedies ... arise out of age-based wrongful discharge for which tort recovery is available by statute.").

Both Plaintiff's claim for intentional infliction of emotional distress and her claim for negligent training and supervision are based on the same alleged illegal employment practices underlying her discrimination claims. *See* (Complaint ¶¶ 61–65, ECF No. 1 (citing no additional facts under her claim for emotional distress other than her general allegations and a recitation of the elements)); (*Id.* ¶ 69 ("Defendant failed to properly hire, train and supervise its agents, servants or employees herein with respect to retaliation, anti discrimination laws, and the effects of such behavior, among other things."²)). Under Nevada Revised Statutes § 613.330, "it is unlawful employment practice to discriminate against any person because of his or her race or color." *Painter v. Atwood*, 912 F. Supp. 2d 962, 964 (D. Nev. 2012). Therefore, Plaintiff's claims based on racial discrimination are "clearly intended to be remedied by the

² Plaintiff argues in her Response that the phrase "among other things" in her Complaint shows that her negligent training and supervision claim is not solely based on discrimination in the workplace. (Response 9:14-10:10, ECF No. 17). However, even if Plaintiff does allege in her Complaint that DSH's employees were negligently trained and supervised regarding matters other than unlawful discrimination, such a conclusory statement does not provide DSH reasonable notice of Plaintiff's claims. *See Twombly*, 550 U.S. at 555.

1 statutory framework” and do not give rise to separate common law tort claims. *See id.* at 964–
2 65 (noting that Nevada Revised Statutes § 613.330 provided the exclusive remedy for claims
3 against employers of unlawful behavior enumerated in it, such as race or age discrimination,
4 but finding that common law claims for sexual harassment are not precluded by the statute).

5 Because Plaintiff’s claims in Count 5 and 6 are premised on allegations of her
6 employer’s illegal racially discriminatory practices, Nevada Revised Statutes § 613.330 is the
7 exclusive remedy for these claims. Accordingly, Plaintiff’s common law tort claims for
8 intentional infliction of emotional distress and negligent training and supervision are dismissed.
9 However, because Plaintiff asserts in her Response that these claims are based on additional
10 conduct beyond DSH’s alleged racial discrimination, the Court will dismiss these counts
11 without prejudice in order to allow Plaintiff to sufficiently plead alternative grounds for these
12 claims that are not precluded by statute.

13 **C. Count 7: Wrongful Termination**

14 Plaintiff’s seventh cause of action is for wrongful termination, known in Nevada as
15 tortious discharge.

16 A tortious discharge may arise regardless of an employee’s at-will status, when no
17 comprehensive statutory remedy exists and the employer terminates an employee for reasons
18 which violate public policy or the discharge is in retaliation for the employee’s actions that “are
19 consistent with or supportive of sound public policy and the common good.” *D’Angelo v.*
20 *Gardner*, 819 P.2d 206, 212, 216, 218 (Nev. 1991). “To prevail, the employee must be able to
21 establish that the dismissal was based upon the employee’s refusing to engage in conduct that
22 was violative of public policy or upon the employee’s engaging in conduct which public policy
23 favors (such as, say, performing jury duty or applying for industrial insurance benefits).”
24 *Bigelow v. Bullard*, 901 P.2d 630, 632 (Nev. 1995). Accordingly, “public policy tortious
25 discharge actions are severely limited to those rare and exceptional cases where the employer’s

1 conduct violates strong and compelling public policy.” *Sands Regent v. Valgardson*, 777 P.2d
2 898, 900 (Nev. 1989). Some examples of these cases include: “the discharge of an employee
3 for seeking industrial insurance benefits, for performing jury duty, for refusing to work under
4 unreasonably dangerous conditions, or for refusing to violate the law.” *Alam v. Reno Hilton*
5 *Corp.*, 819 F. Supp. 905, 910 (D. Nev. 1993).

6 Plaintiff alleges that DSH “terminated [her] employment under the false premise that she
7 violated the Defendants policies because she was the only Monitoring Tech in the Telemetry
8 Room.” (Complaint ¶ 74, ECF No. 1). Plaintiff also alleges that prior to being terminated, she
9 had complained about DSH’s employment practices in staffing the telemetry department, which
10 placed the health, safety, and welfare of patients in jeopardy. (*Id.* ¶¶ 75–77). She therefore
11 contends that the real reason she was terminated was because “it was easier for [DSH] to
12 terminate Plaintiff’s employment rather than comply with its legal obligations under state and
13 federal laws.” (*Id.* ¶ 73). She further alleges that her discharge “was in direct contravention of
14 the public policy of the State of Nevada and [DSH]’s own action and inaction with respect to its
15 hiring and staffing practices are what led to the Plaintiff being the only Monitoring Tech in the
16 Telemetry Room.” (*Id.* ¶ 78).

17 Plaintiff, however, fails to ever identify what public policy she alleges has been violated.
18 (Complaint ¶¶ 72–81, ECF No. 1). Therefore, her Complaint fails to give DSH sufficient notice
19 of her tortious discharge claim under the pleading standards in *Iqbal* and *Twombly*.

20 Moreover, Plaintiff appears to allege that she was discharged for complaining to DSH
21 about their unsafe staffing policies, and, therefore, she was engaged in some kind of

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1 whistleblowing activity that should be protected by public policy.³ (*Id.* ¶ 73). However, “such
2 internal reporting or exposure is merely private and proprietary and is not sufficient to maintain
3 a tortious discharge claim based on whistleblowing.” *Bielser v. Prof'l Sys. Corp.*, 321 F. Supp.
4 2d 1165, 1169 (D. Nev. 2004) (citing *Wiltsie v. Baby Grand Corp.*, 774 P.2d 432, 433–34 (Nev.
5 1989)). Accordingly, because internal reporting to an employer is not entitled to public policy
6 protection, Plaintiff’s tortious discharge claim based on her internal complaining about DSH’s
7 policies must fail, and Count 7 in her Complaint is dismissed. However, because it is unclear
8 from the Complaint whether Plaintiff may have some other ground for alleging her discharge
9 was in violation of public policy, the Court will dismiss this claim without prejudice.

10 **D. Motion to Amend**

11 Plaintiff filed a motion requesting that she be permitted to file an amended complaint if
12 this Court dismisses any of her causes of action in the Complaint. (Countermotion to Amend,
13 ECF No. 18).

14 Pursuant to Rule 15(a), the court should “freely” give leave to amend “when justice so
15 requires,” and in the absence of a reason such as “undue delay, bad faith or dilatory motive on
16 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,
17 undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the
18 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is
19 only denied when it is clear that the deficiencies of the complaint cannot be cured by
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21 ³ In her Response, Plaintiff changes tack from her pleading and argues that the discrimination and retaliation she
22 experienced was a violation of public policy. (Response 14:1-15:3, ECF No. 17). However, in the very case
23 relied on by Plaintiff in her Response, *D’Angelo v. Gardner*, the Supreme Court of Nevada held that “it will not
24 recognize a claim for tortious discharge when an adequate statutory remedy already exists, as it would be unfair
25 to a defendant to allow additional tort remedies under such circumstances.” *Ozawa v. Vision Airlines, Inc.*, 216
P.3d 788, 791 (Nev. 2009) (explaining the holding in *D’Angelo*, 819 P.2d at 217). Because Plaintiff has an
adequate statutory remedy for her discrimination claims under either 42 U.S.C. § 1981 or Nev. Rev. Stat. §
613.330, that discrimination cannot be a basis for her tortious discharge claim. See *D’Angelo*, 819 P.2d at 217.

1 amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

2 Here, the Court finds no evidence of undue delay or bad faith. Furthermore, under the
3 current circumstances, there is no reason to suspect that the claims in the Complaint which have
4 been dismissed without prejudice cannot be sufficiently alleged in an amended complaint.

5 Local Rule 15-1, however, requires that a party moving to amend a pleading must attach
6 the proposed amended pleading to their motion to amend, and if that party's motion to amend is
7 granted, then the attached pleading shall be filed and served. D. Nev. L.R. 15-1. While Plaintiff
8 did attach a document entitled "First Amended Complaint" to her Counter Motion to Amend
9 (Ex. A to Countermotion to Amend 19-40, ECF No. 18), the "First Amended Complaint" only
10 provides some additional detail regarding the events leading up to Plaintiff termination but does
11 not correct any of the deficiencies noted in this Order. (*Id.* ¶¶ 1-31). The Court, therefore,
12 denies Plaintiffs' Countermotion to Amend without prejudice and grants Plaintiff leave to file
13 an amended complaint that may sufficiently amend her original complaint. (ECF No. 18).

14 **IV. CONCLUSION**

15 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (ECF No. 13) is
16 **GRANTED**. Plaintiff's claims for disparate impact and for gender discrimination under §
17 1981 are dismissed with prejudice. Plaintiff's claims for intentional racial discrimination,
18 intentional infliction of emotional distress, negligent training and supervision, and tortious
19 discharge are dismissed without prejudice. Plaintiff shall have until September 26, 2014 to file
20 an amended complaint correcting the definiteness described in this Order.

21 **IT IS FURTHER ORDERED** Plaintiff's Countermotion to Amend the Complaint
22 (ECF No. 18) is **DENIED without prejudice**.

23 **DATED** this 15th day of September, 2014.

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Gloria M. Navarro, Chief Judge
United States District Judge